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NO. 89-510

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LARRY R. MEACHUM, COMMISSIONER,
CONNECTICUT DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

WAYNE B. ALEXANDER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE STATE OF SOUTH DAKOTA, ET AL.*

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires suppression of a jailhouse statement made by a prisoner to his friend where: (1) the friend voluntarily informs police, on a continuing basis, of the information confided to him by the prisoner; (2) the friend requests and receives police transportation to and from the prison; and (3) the information pertains to murder, an offense which was uncharged at the time the statement was made.

2. Whether a judgment of the Court of Appeals must be vacated where, without applying the presumption of correctness mandated by 28 U.S.C. § 2254(d) and without complying with the dictates of Sumner v. Mata, 449 U.S. 531 (1981), the Court of Appeals relied upon its own findings of fact, which are contrary to those of a state trial court and state supreme court and are unsupported by the record.

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The Amici States, identified in Appendix A, hereby pray that the Court issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case.

INTEREST OF AMICI CURIAE

The State of South Dakota submits this brief as amicus curiae in support of the Petition for Writ of Certiorari filed by the State of Connecticut. Connecticut seeks

review of the decision of the Second Circuit Court of Appeals in Alexander v. State of Connecticut, 876 F.2d 277 (2nd Cir. 1989). Connecticut approves South Dakota's submission of this brief as amicus curiae.

Availability and use of informants in criminal investigations and convictions is becoming increasingly common. Such informant testimony at trial often is challenged on the basis of an entangling relationship between the informant and law enforcement authorities. If that entanglement constitutes an agency relationship, the informant may have violated the defendant's Fifth Amendment rights if the informant did not administer the warning required by Miranda v. Arizona, 384 U.S. 436 (1965). Such Miranda-based challenges are becoming much more common. For example, South Dakota faces the issue in a habeas corpus proceeding in federal court and awaits a decision on a corollary issue in

the state supreme court. Clear guidance on this issue is necessary to law enforcement authorities and courts.

In addition, 28 U.S.C. § 2254(d) requires that federal courts considering habeas corpus petitions presume correctness of state court factual findings, except where certain limited circumstances exist. All of the states are called upon tc defend against applications for writs of habeas corpus in federal courts. These applications for writs issue after the highest state courts have already rejected the grounds for release presented by the petitioner. In many cases, the state courts have made factual findings, which this Court and the Congress have indicated should be given great deference. Since the Second Circuit in this case refused to give such deference to the Connecticut Supreme Court, the Amici States request that the petition be granted.

SUMMARY OF ARGUMENTS

The Second Circuit has held that an informant elicited information from Respondent in such a manner and under such circumstances that an agency relationship was formed with law enforcement, thus violating Respondent's Fifth Amendment rights in the absence of a warning as required under Miranda v. Arizona, 384 U.S. 436 (1965), and given by the informant. Other circuits have held that an agency relationship was not established under similar circumstances. Based on the majority rule in federal appeals courts, an agency relationship is not formed between law enforcement personnel and an informant if the informant is not compensated, if the informant acts independently and voluntarily or if the informant is self-motivated. No "bright line" of authority from this Court exists for such a "non-agency" conclusion, however.

Since the decision in this case conflicts with the decisions of other federal courts of appeals, and since the lower courts and law enforcement officers require guidance on the issue, the Writ should be granted.

In reaching its conclusion that agency existed, the Second Circuit rejected factual findings of the Connecticut Supreme Court. The Amici States contend that it was improper for the Second Circuit to do so under 28 U.S.C. § 2254(d) and Sumner v. Mata, 449 U.S. 539, 551 (1981). Sumner requires that a federal court, before rejecting state court findings of fact, set forth its reasons. The Second Circuit did not do so in this case. The Amici States contend that the ultimate finding of non-agency was subject to deference under § 2254(d). Even if this is not the case, however, this Court's cases require that deference be given to subsidiary findings of historical fact made by the

Connecticut Supreme Court. Because the Second Circuit made no mention of § 2254(d) in making its ruling, it failed to give deference to the state court. Its decision therefore conflicts with the decisions of other courts of appeals and with Sumner v. Mata, itself. For this reason, this Court should grant the writ and reverse the decision of the Court of Appeals of the Second Circuit.

ARGUMENTS

I

THE SECOND CIRCUIT COURT OF APPEALS BROUGHT ITSELF INTO CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS WHEN IT HELD THAT AN INFORMANT WHO IS COOPERATING WITH LAW ENFORCEMENT AUTHORITIES MUST ISSUE MIRANDA WARNINGS TO A DEFENDANT, EVEN THOUGH THE INFORMANT ACTS INDEPENDENTLY AND VOLUNTARILY, ACTS WITHOUT COMPENSATION AND IS SELF-MOTIVATED.[1]

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[1]In order for the Second Circuit to find
(Footnote Continued)

A significant aspect of the respective holdings of the Supreme Court of Connecticut and the Second Circuit Court of Appeals turns on the alleged agency relationship between Papagolas and law enforcement personnel. From the outset, Alexander has maintained that his conversations with Papagolas amounted to interrogation by police and, therefore, he was deprived of his Fifth Amendment rights when Papagolas' testimony was admitted at trial. Prior to examining that constitutional issue, the Supreme Court of Connecticut correctly observed that study of such an issue first required inquiry into any potential agency relationship

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(Footnote Continued)
a Fifth Amendment violation, the court necessarily was required to find that Papagolas was an agent of law enforcement. The agency discussion in this brief is, therefore, but another aspect of the compelled self-incrimination issue raised by Connecticut's Petition.

between Papagolas and the police.[2] "[A] necessary predicate to both constitutional claims is a determination that the incriminating statements to Papagolas that the defendant seeks to suppress were in fact elicited from the defendant as a result of interrogation by Papagolas acting as a police officer or as an agent of the police. See United States v. Henry, 447 U.S. 264, 269-70 . . . ." State v. Alexander, 197 Conn. 183, 496 A.2d 486, 488 (1985). The court explained that "The issue of agency, even in

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[2]The warning by law enforcement officers required under Miranda v. Arizona, 384 U.S. 436 (1965), applies to Fifth Amendment rights. Id. at 473-476. Agency also may arise as an issue in Sixth Amendment cases. Thus, before examining a claim of deprivation of either constitutional right by an informant, a court may determine whether the informant has associated himself with law enforcement by an agency relationship. Consequently, both Fifth Amendment cases and Sixth Amendment cases provide useful analysis when deciding the agency question.

a constitutional context, is primarily a question of fact [citation to Thomas v. Cox, 708 F.2d 132 (4th Cir.) cert. denied, 464 U.S. 918] . . ." and eventually concluded that the underlying factual situation could not sustain a finding of agency between Papagolas and law enforcement.

In Alexander v. State of Connecticut, 876 F.2d 277 (2nd Cir. 1989), the Second Circuit failed to give credence to the Connecticut court's finding of no agency relationship. The federal appellate court first determined:

> The Miranda safeguards apply in situations in which an incarcerated suspect is interrogated about an offense other than the one for which he is imprisoned. See Mathis v. United States, 391 U.S. 1, . . . (1968). When Papagolas visited Alexander after his request for counsel, his fifth amendment rights under Miranda had attached even though Papagolas's questioning involved an offense other than the one for which he was incarcerated. [Citation to Arizona v. Roberson, 486 U.S. ___ (1988).]

Id. at 282. The court continued, finding:

> Alexander's second confession was not a spontaneous, unsolicited statement, but a product of the pressures of Papagolas's systematic questioning in compliance with the requests of the police while Alexander was in custody and after he had demanded counsel. Alexander's implicit fifth amendment rights under Miranda were therefore violated.

Id. at 283. Of course, the court reached its conclusion after its in-depth examination of the circumstances involving Alexander, Papagolas and the police.

While the Supreme Court of Connecticut cited Thomas v. Cox among its authorities, the Second Circuit Court of Appeals did not, perhaps because the Fourth Circuit Court of Appeals reached an opposite conclusion in Thomas v. Cox after examining remarkably similar facts. Thomas was charged with murder and, during his incarceration in a county jail, he became acquainted with another inmate named Gregory. Id. at 133.

During general conversations, Thomas made several incriminating statements to Gregory throughout ensuing weeks. Later, Gregory encountered a county sheriff's investigator and told the investigator that Thomas was guilty, based on Thomas' statements. Gregory, however, declined to provide further information, including his refusal to speak with the local prosecutor. Later, however, Gregory encountered another investigator and provided him a sheet of paper containing a handwritten listing of Thomas' damaging admissions. The investigator did not instruct Gregory to interrogate Thomas, but did ask the prisoner to provide whatever additional information he might obtain. Gregory was not offered any inducement for his assistance. At a hearing during Thomas' trial, Gregory told the trial court that his motivation to seek information from Thomas was simple curiosity. Id. at 134.

In its examination of the case, the Fourth Circuit Court of Appeals concentrated on United States v. Henry, 447 U.S. 264 (1980). The court first stated that any legal classification of the relationship between Gregory and the police did not turn exclusively on Gregory's lack of monetary incentive. Id. at 134-135. Nonetheless, the court said, after observing that Henry had been a paid informant, "From these circumstances the Court in Henry was able to characterize the informant as a 'Government agent expressly commissioned to secure evidence.'" Id. at 135. After sustaining the trial court's factual findings (id. at 135), the court ruled:

> So far as this record discloses, for whatever reason Gregory acted--whether 'conscience,' as the state court found, or 'curiosity,' as he testified, or even conceivably from an unencouraged hope to curry favor, [citation omitted]--he could not properly be characterized, as could the

> informant in Henry, as 'a Government agent expressly commissioned to secure evidence.'

Id. at 136.

The Thomas court explained the holding, stating, "As we read Henry, the relationship between state and informer in that case must approach or reach the outer limits of the relationship required to 'attribute' to the state the private citizen's conduct as 'surreptitious interrogator.'" Id. at 137. Since the court declined to find such a relationship, it is apparent that in circumstances involving self-motivated informants acting without potential compensation by police, the Second and Fourth Circuit Courts of Appeals reach opposite conclusions regarding agency.

The Fourth Circuit Court of Appeals is not alone among federal appellate courts in disagreeing with the Second Circuit. In United States v. Taylor, 800 F.2d 1012 (10th

Cir. 1986), the Tenth Circuit Court of Appeals scrutinized another situation involving a jailhouse informant in the context of a Sixth Amendment violation. While Taylor was awaiting trial in a county jail in Oklahoma, he encountered Wayne Nave, with whom he had previously been employed. Id. at 1014. Taylor initiated a conversation and then admitted to Nave that he had committed several bank robberies. Nave later requested an audience with an agent of the Federal Bureau of Investigation. Nave outlined Taylor's admission to the agent. Subsequently, Taylor was moved into the same cell as Nave, where Taylor provided additional details of the robberies, which information Nave again relayed. In that instance, however, Nave testified at trial that he had hoped to be rewarded for his cooperation with law enforcement.

Nonetheless, he received no positive reply from the government. Id. at 1014-1015.

The Tenth Circuit recorded that Taylor's claim of error was based on United States v. Henry, and said, "We have been unable to find any bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel. [Citation to Thomas v. Cox.]" Id. at 1015. After agreeing with the Fourth Circuit that the dominant factor in the Henry ruling was Henry's informant's compensation and willingness to follow government instructions, the court found that Nave was not a government agent.

> Under the facts of this case, we hold that Nave was not a Government agent. No agreement was made between Nave and the Government and no benefits accrued to Nave for his cooperation. Any benefits which Nave hoped to obtain were mere expectancies. . . . In the absence of any express or implied quid pro quo underlying the relationship between Nave and the Government,

> [citation to Thomas v. Cox], and in the absence of any instructions or directions by the Government, we hold that Nave was not a Government agent. Taylor's right to counsel was not violated even if Nave had deliberately elicited incriminating statements from Taylor.

Id. at 1016. Consequently, the court found Nave's testimony was properly admitted into evidence. Id.

Other recent cases in federal appeals courts have provided no uniformity. One seeming departure from the Second Circuit holding in the case at bar was an earlier ruling by that court. In United States v. Calder, 641 F.2d 76 (2d Cir. 1981), the court examined underlying circumstances where, again, the appellant talked to an informant while incarcerated pending trial. Id. at 78. The informant, Joseph Bennett, reported the conversation to his attorney who, in turn, relayed it to the authorities. Two weeks after the conversation, Bennett entered into

a cooperation agreement with federal authorities regarding his own charges. Eventually, he also cooperated on Calder's case. Calder appealed his conviction, in part, on an alleged violation of his Fifth Amendment and Sixth Amendment rights. Id.

The Calder court, as usual, examined the facts in light of United States v. Henry. The court noted that Henry's underlying circumstances involved testimony by an informant being paid on a contingent fee basis. Id. at 78-79. The court also observed that this Court approved government introduction of testimony by another individual (also incarcerated with Henry) who was not paid and who made no prior arrangements with authorities to report Henry's incriminating statements. Id. at 79. The Second Circuit Court of Appeals held that "Bennett was not acting as a Government agent when he talked with Calder." Id.

The Tenth Circuit Court of Appeals made a similar analysis in United States v. Franklin, 704 F.2d 1183 (10th Cir.), cert. denied, 464 U.S. 845 (1983). There, Franklin visited his former wife, Anita Cooper, after committing a double murder. Id. at 1186. He made a passing remark to her about the murder, which remark did not overtly link him to the crime. After his arrest, however, Franklin again contacted Cooper and on that occasion unquestionably confessed to the murder. Id at 1187. The government used Cooper's testimony of Franklin's statements at trial, an action which Franklin challenged on the basis of the Fifth and Sixth Amendments.

As to his Sixth Amendment argument, the Court found that "Contrary to Franklin's suggestion, Massiah is inapplicable here . . . because his incriminating statement was not one 'which federal agents had

deliberately elicited from him.' [Citation to Massiah.]"[3] Id. at 1189. The court continued, "Furthermore, even had Franklin's right to counsel attached, his statement to Cooper would still be admissible because it was not deliberately elicited from him by federal agents. [Citation to United States v. Henry, supra.]" Id. After analyzing Henry, the court concluded, "In contrast, Cooper was neither paid nor instructed. She had been contacted by the FBI and had consented to have her phone tapped, but from the record before us it appears that, unlike the informant in Henry, she was a 'passive

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[3]This Court's decision in Massiah v. United States, 377 U.S. 201 (1964), held that admissions made via an informant's hidden radio transmitter to eavesdropping federal agents, after Massiah had secured the services of an attorney, were inadmissible as a violation of Massiah's Sixth Amendment rights.

listener.'" Id. at 1190. (Emphasis supplied.) Although she acted at the behest of federal agents, Franklin's ex-wife nonetheless was determined not to be a government agent.

The issue of an agency relationship due to entanglement between an informant and law enforcement often arises in the federal courts, but no "bright line" rule has, as yet, been authored by this Court. Although a majority of federal appellate courts hold that such a relationship is difficult to establish, no universal rule exists on the issue. The decision of the Second Circuit in this matter offers no particular guidance and conflicts with other federal decisions. Guidance on the issue of law enforcement/informant agency relationships is necessary for present and future judicial uniformity and the administration of justice.

II

THE SECOND CIRCUIT BROUGHT ITSELF INTO CONFLICT WITH DECISIONS OF THIS COURT AND SEVERAL COURTS OF APPEALS WHEN IT FAILED TO GIVE A PRESUMPTION OF CORRECTNESS TO THE FACTUAL FINDINGS OF THE CONNECTICUT SUPREME COURT.

As noted in the first argument, in its ruling in this case, the Second Circuit found, contrary to the findings of the Connecticut Supreme Court, that Papagolas was an agent of law enforcement for Fifth Amendment purposes. In coming to this finding, the Court of Appeals rejected the underlying facts as found by the state court, as well as this ultimate finding. Thus, the Second Circuit ruling in this case conflicts directly with prior precedent of this Court and with precedent in the Fourth and Tenth Circuits, even if it is accepted that the ultimate finding of agency is one of law or mixed law and fact. Sumner v. Mata, 455 U.S. 591, 593 (1982) (per curium); see, Miller v.

Fenton, 474 U.S. 104, 112 (1985), which held that even though the ultimate question of voluntariness of a confession is one of mixed fact and law, as to which 28 U.S.C. § 2254(d) does not apply, subsidiary findings of fact of the state court leading to this conclusion are entitled to the § 2254(d) presumption of correctness.

The Amici States contend, first, that the Connecticut Supreme Court's ultimate finding of fact that there was no agency relationship between Papagolas and the police should have been accorded a presumption of correctness under § 2254(d). As that court noted, 197 Conn. at 184-85, 496 A.2d at 489, Petition Appendix (hereinafter App.) at A-35, whether Papagolas was a state agent turned almost exclusively on the facts. See, Maine v. Moulton, 474 U.S. 159, 168 (1985); United States v. Henry; and Massiah v. United States, 377 U.S. at 202-204. See also Thomas

v. Cox. It is plain from a reading of the opinion of the Second Circuit, App. at A-1, and that of the Connecticut Supreme Court, App. at A-30, that the two courts came to differing conclusions based upon their respective view of the facts, not the law. They chose to believe--or emphasize--different evidence, although each had the same evidence before it. Notably, they did not set forth differing views on the law as to what constitutes a government agent. Such factual determinations are best left to the state courts, because they go to the power to determine credibility (Miller v. Fenton) and involve largely subsidiary determinations of historical fact. Id. at 112; 114; 117; Sumner v. Mata; Cuyler v. Sullivan, 446 U.S. 335, 341-342 (1980).

The Amici States admit that there is no bright line rule as to when a finding is subject to the § 2254(d) presumption. This

Court has held that ultimate voluntariness of a confession is not subject to the presumption, Miller v. Fenton, 474 U.S. at 117-118, but that whether an informant "deliberately elicited" statements from a fellow prisoner is subject to the presumption, Kuhlmann v. Wilson, 477 U.S. 436, 460-461 (1986).

Numerous other factual and legal issues have been held subject or not subject to the presumption. Ineffectiveness of counsel is not subject to the presumption, Strickland v. Washington, 466 U.S. 668 (1984); felony murder death penalty criteria are, Cabana v. Bullock, 474 U.S. 376 (1986); harmless error, as an ultimate conclusion, is not, Rushen v. Spain, 464 U.S. 114 (1983); pretrial identification procedures, as to the ultimate legal conclusion, are not, Sumner v. Mata, 455 U.S. 491 (1982); juror bias is fully subject to the presumption, Patton v. Yount,

467 U.S. 1025 (1982), Wainwright v. Witt, 469 U.S. 412 (1985); a finding of prosecutorial misconduct is not, in its final ultimate form, subject to the presumption, Smith v. Phillips, 455 U.S. 209 (1982). An ultimate finding of guilty plea voluntariness is not subject to the presumption, Marshall v. Lonberger, 459 U.S. 422 (1983); nor is an ultimate finding of waiver of the right to counsel, Brewer v. Williams, 430 U.S. 387 (1977); competency to proceed to trial, even as an ultimate fact, is subject to the presumption, Maggio v. Fulford, 462 U.S. 111 (1983).

This Court has yet to determine whether a finding that a person is not an agent of law enforcement, as made in this case, is subject to the presumption. From the cases cited in the preceding paragraph, it would appear that several factors are critical to this determination. If the federal court is

merely applying a federal standard to facts found by the state court, the presumption would be less likely to apply. This Court's prior precedent also figures importantly in the determination. See Miller v. Fenton, 474 U.S. at 115.

The nature of the inquiry, whether historical-factual or largely legal, is also important. If the question is one of determination of credibility, it is much more likely that § 2254(d) will be applicable. Miller v. Fenton, 474 U.S. at 116-117. Also considered important in Miller was whether the critical facts took place before a court or in secret. Id. at 117. The Amici States submit that the majority of these factors militate in favor of applicability of the presumption in this case, even to the ultimate finding of no agency relationship. Whether there was agency is largely a function of the historical facts.

If those historical facts are viewed as found by the Connecticut courts, a finding of no agency relationship is likely. Certainly, some of the factors would argue in favor of considering the agency finding to be one of law or mixed fact and law. For example, the critical facts took place in secret, not before a court of record. A determination of which witnesses to believe is, however, clearly subject to the presumption. Sumner v. Mata, 455 U.S. at 597; see, Kuhlmann v. Wilson, 477 U.S. at 459-460, wherein this Court held that a question whether certain admissions were "deliberately elicited" by a police agent was subject to the presumption.

Even if the ultimate finding of no agency relationship was not subject to the presumption, the court of appeals should have considered the presumption and made a written finding as to why it was not applicable. By simply disagreeing but failing to discuss the

matter, the court of appeals brought itself into conflict with prior decisions of this Court. Sumner v. Mata, 449 U.S. at 551; Sumner v. Mata, 455 U.S. at 593. The decision also conflicts with that of at least one other circuit court of appeals. Thomas v. Cox, 708 F.2d at 135. The writ could and should be granted for this reason alone.

Even assuming for the sake of argument that the ultimate finding of non-agency is not subject to the § 2254(d) presumption, subsidiary questions of fact underlying this ultimate finding are. In each of the cases where this Court has found § 2254(d) inapplicable to the ultimate factual or legal finding, it has, nonetheless, found the presumption applicable to subsidiary questions of fact. See e.g. Sumner v. Mata, 455 U.S. at 597.

The Court of Appeals took a significantly different approach to the

subsidiary questions of fact than that of the Connecticut Supreme Court. The Connecticut Supreme Court found (197 Conn. at 187, 496 A.2d at 490, App. at A-37) that there was conflicting testimony about whether Rearick and Jacewicz, police officers, ever asked Papagolas to go to the jail to get information, as opposed to simply supporting his self-initiated decision to go. The Court found that police provided transportation services and that during that transportation Papagolas told them what Alexander told him. Further, the police neither initiated contact with Papagolas nor directed his activities. He had no previous affiliation with the police and was neither rewarded monetarily nor promised any favors in return for his cooperation. The Connecticut Supreme Court also held (id. at note 4) that there was no evidence indicating that the police offered Papagolas any rewards, such as not being

fined for driving without a license, obtaining recommendations to the Florida State Police or receiving a film projector, in exchange for obtaining incriminating evidence from Alexander.

In the face of these clearly factual, subsidiary findings from the Connecticut Supreme Court, the Second Circuit made its own findings. That court found, 876 F.2d at 282, App. at A-11-12, that the police persuaded Papagolas to continue his visits to Alexander and to advise them about what he learned. The Second Circuit also found that the police specifically asked Papagolas to get more information from Alexander. That court also found that the police "debriefed Papagolas" on the ride back to his home and refrained from giving him a citation for driving without a license. Each of these findings, critical to the Second Circuit's ultimate finding of agency, is directly

opposed to the findings of the Connecticut Supreme Court. Each is a finding of pure historical fact. No explanation of the Second Circuit's rejection of the Connecticut Supreme Court findings is given in its opinion. This course of judicial proceeding is directly contrary to 28 U.S.C. § 2254(d) and to Sumner v. Mata, 449 U.S. at 551. Sumner requires, at a minimum, that if the finding of a state court is to be rejected, the federal court must give, in its opinion granting the writ, the reason which led it to conclude that any of the first seven factors of § 2254(d) are present or the reason which led it to conclude that the state findings it is rejecting are not fairly supported by a record.

The Second Circuit not only did not fulfill this clear obligation, but it failed even to cite to § 2254(d) when rejecting the Connecticut court's findings. Section

2254(d) requires a greater respect for the findings of state courts than was granted in this instance by the Second Circuit. For this additional reason, the writ should be granted.

CONCLUSION

Because a conflict exists between the circuits as to when a person becomes an agent of law enforcement, this Court should grant the petitioned writ. In addition, the Second Circuit in this case failed to accord the factual findings of the Connecticut Supreme Court the deference to which they are entitled under 28 U.S.C. § 2254(d). The Amici States therefore urge this Court to

grant the Writ of Certiorari, and to reverse the decision below.

Dated this 25th day of October, 1989.

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